

CITY OF GAITHERSBURG
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**MINUTES OF A MEETING OF THE BOARD OF APPEALS
THURSDAY, JANUARY 11, 2007**

Chairperson Harvey Kaye called the meeting to order at 7:30 p.m. Members present: Richard Knoebel, Vice Chairperson and Board Members Gary Trojak, Carol Rieg, and Alternate David Friend Absent: Victor MacDonald. Staff present: Caroline Seiden, Planner, Cathy Borten, City Attorney, William Chen, Attorney to the Board of Appeals, Fred Felton, Assistant City Manager, Greg Ossont, Planning and Code Administration Director, David Podolsky, Outside Counsel, Stan Abrams, Special Counsel, and Charlene Milton, Recording Secretary.

I. APPROVAL OF MINUTES

Motion was made by Board Member Knoebel, seconded by Board Member Rieg, that the minutes of the November 9, 2006, Board of Appeals meeting be approved, as submitted.

VOTE: 3-0-1 (Abstained: Kaye)

II. ADMINISTRATIVE REVIEW

A-526 RST Development, LLC

The application requests an Administrative Review of a determination by City staff requiring a site plan amendment approval from the Planning Commission prior to reoccupation of existing dwellings at West Deer Park Apartments, 70 West Deer Park Road, Parcel A, Gaithersburg, Maryland.

Planner Caroline Seiden stated that Administrative Review A-526 was advertised in the December 27, 2006, issue of the *Gaithersburg Gazette* and that there are twenty-eight (28) exhibits in the record file.

Chairperson Kaye announced that there was a Motion to Dismiss which would be the first order of business. Mr. Kaye stated that Mr. David Podolsky has filed a Motion of Dismissal and has requested that the filing deadlines regarding pre-hearing statements on the merits of the case be suspended until the Board of Appeals rules on the Motion to Dismiss.

Chairperson Kaye asked counsel whether they could stipulate to the facts of each other's motions. Mr. Steve Bogorad, attorney for the petitioner, said he planned on calling two witnesses; one to talk about the October 23rd meeting and the other to testify to a subsequent conversation between the petitioner and Fred Felton, Assistant City Manager.

Mr. David Podolsky, outside counsel for the City of Gaithersburg argued that the Board of Appeals rule on the Motion to Dismiss, which was based on the letter of November 8, 2006. He added that it was their position that the decision was made on October 23rd.

Mr. Steven Bogorad, Holland & Knight, representing the petitioner, said that the November 8th letter invites still further discussion as it suggests that RST could outline their objection in writing and the City would provide a written response. He also received a call from Caroline Seiden, Board of Appeals liaison, suggesting the appeal may be premature but when asked for a letter to that affect, she declined, so they decided not to withdraw the appeal.

Mr. Podolsky said that the City's position is that the decision of an October 23, 2006 meeting was the City's final decision and that the reference in the November 8 letter to further clarification deals with the submission requirement for the site plan amendment, not whether a site plan amendment is required.

Board Members Gary Trojak and Richard Knoebel suggested that there be testimony from both parties to find out information regarding the October 23rd meeting, who attended, and what discussions took place.

Chairperson Kaye swore in witness Fred Felton, testifying for the City. Mr. Felton responded to questioning from Mr. Podolsky that he attended a meeting on October 23, 2006, with City Manager Dave Humpton, Planning and Code Administration Director Greg Ossont, City Attorney Cathy Borten, Special Counsel Stan Abrams, as well as RST Development representatives Bob Harris, Scott Copeland, and Steven Siegel. He stated the purpose of the meeting was to discuss what would be required prior to the City permitting RST Development to reoccupy the 198 existing apartments that were currently vacant at West Deer Park. He noted that in 2005, RST Development received approval for a redevelopment project of 130 townhouses. A relocation project was begun and the City worked with the developer in the relocation of 198 families which was completed by July of 2006.

Mr. Felton continued that in late September, Mr. Ossont communicated to him that Mr. Copeland had inquired as to what was necessary to reoccupy the project. He said in a meeting with Mr. Copeland, Mr. Siegel and Mr. Ossont, it was explained that this had never happened before and ultimately a meeting was scheduled for October 23, 2006 to outline the City's position on what was necessary prior to considering reoccupying the property. After internal discussions with City staff and counsel the conclusion was reached that they would need to file a site plan amendment and obtain Planning Commission approval prior to reoccupying the property.

Mr. Felton further testified that the purpose of the meeting was to communicate the City's position as their final position. Further discussions included what must be submitted with the application. Referencing his November 8, 2006, letter, Mr. Felton said it was again all about submission requirements but that he was willing to consider objections to submissions. Mr. Felton said that any reference to RST contacting the Mayor and City Council during the October 23rd meeting was for RST to approach the Mayor and Council for a possible legislative remedy, i.e. text amendment to the zoning ordinance. In response to questioning from Mr. Podolsky, Mr. Felton said that the City was very clear that this was their final position.

In questions from the petitioner's attorney Mr. Bogorad, Mr. Felton answered that during a meeting in late September he did not recall a statement from Mr. Ossont that the City could not stop RST Development from re-tenanting the property. He said if the statement had been made he would have immediately disagreed. What was communicated at that meeting was the City did not know what was required and that they would have to consult with counsel. Mr. Felton said that his view was that reoccupying the apartments as rental units was contrary to the site plan as there was an approved site plan for 130 townhouses for that property. He said the City did consult with counsel and then a decision was communicated on October 23rd. Mr. Felton testified that at the October 23rd meeting it was clearly communicated by Special Counsel Stan Abrams, himself, and City Manager Humpton that the City's position was that RST Development needed a site plan amendment.

Upon further questioning, Mr. Felton responded that he did not use the word "final," but he did recall saying that it is the City's position and the only help they could seek from the Mayor and City Council would be for them to seek approval for a legislative remedy.

Mr. Bogorad asked about the telephone conversation between Mr. Felton and Mr. Copeland the following week when he suggested both sides put their positions in writing. Mr. Felton said that during the course of that conversation which included Mr. Ossont, things got emotional and he had suggested that from now on that everything should be in writing. He said the only thing subject to any discussion after the October 23rd meeting was which submission requirements were relevant.

Mr. Felton said that in his letter of November 8, 2006, to Mr. Copeland he attached fifteen questions from the developer regarding applicability of certain site plan requirements and the responses from Mr. Ossont. He did not remember any of these questions being raised at the October 23rd meeting.

Responding to a question from Board Member Trojak, Mr. Felton explained that the November 8th letter came after the telephone conversation with Mr. Copeland where they agreed to future communication in writing.

Board of Appeals Attorney William Chen asked how the October 23rd meeting came about and whether it was a meeting of a normal public session. Mr. Felton answered that after a previous informal meeting with Mr. Copeland, Mr. Siegel, and Mr. Ossont and himself, they determined they would need to consult with counsel and the October 23rd meeting was scheduled. He said the October 23rd meeting was more formal than normal meetings because they were communicating the City's position. Mr. Chen asked which agency rendered the decision that a site plan amendment was required, to which Mr. Felton responded that the decision was made in a meeting attended by City Manager Humpton, City Attorney Borten, P&CA Director Ossont and himself, but ultimately by City Manager Humpton.

Mr. Chen inquired whether during the October 23rd meeting, the developer was informed that the decision was made by Mr. Humpton to which Mr. Felton said that the decision was communicated through Mr. Abrams; but he did not recall if the words "City Manager" were used. He added that it was the City Manager's intent both before and during the meeting that the City's position would be conveyed by expert zoning counsel Abrams. Mr. Chen inquired as to the ordinance provision that authorized this type of decision. Mr. Felton would research and provide an answer but added that there is a reference in the zoning ordinance that the city manager or his designee shall have the authority to make such decisions.

Mr. Chen asked if during the October 23rd meeting anyone used the word “final.” Mr. Felton said Mr. Abrams used the word “final” and that he had misspoken earlier and that he had probably used the word “final” also. Mr. Podolsky asked if anyone in the October 23rd meeting indicated that any statements that Mr. Abrams made or statements by Mr. Felton were subject to further review or written communication by the City Manager. Mr. Felton said that the City Manager was present as well as himself and Mr. Ossont, both of whom serve as the City manager’s designee almost exclusively on land issues and it was abundantly clear that this was the City’s final action.

Chairperson Kaye swore in witness Greg Ossont, testifying for the City. In questions from Mr. Podolsky, Mr. Ossont reiterated the date of the meeting and who was present. He said that in a meeting held in September with the applicant it was communicated that the request to reoccupy the apartments was a unique request and so the City would need to seek legal counsel. He said at some point before the October 23rd meeting he had a conversation with either Mr. Copeland or Mr. Siegel regarding the requirements, which precipitated a letter to Mayor Katz from Mr. Copeland. This letter had questions regarding non-conforming uses and the requirement of the zone. Mr. Ossont said that it was clearly stated at the October 23rd meeting for the developer to obtain a site plan amendment and the paperwork was provided to them at the front counter of the Planning & Code Administration.

In response to Mr. Podolsky about prior communication with the developer, Mr. Ossont said that there had been conversations about whether or not the property was conforming or non-conforming, so the purpose of the meeting was to resolve issues and to clearly state what would be required. Mr. Ossont responded to Mr. Podolsky that there were no minutes from the meeting, only that it was stated that the developer would need to apply for a site plan amendment. He said that Mr. Siegel inquired as to the submissions required to which his response was to provide Mr. Siegel with forms downstairs.

Mr. Bogorad asked Mr. Ossont if anyone from the City told the applicant that the purpose of the October 23rd meeting was to make a final determination. Mr. Ossont answered no but it was with the understanding to discuss what the process would be and what would be required of them. Mr. Ossont also responded that he felt the applicant was clear on the City’s position. He said that after the meeting he provided them with a submission requirement checklist.

Mr. Bogorad asked Mr. Ossont if in preliminary discussions he had suggested the site plan amendment would be relatively minor. Mr. Ossont said it may or may not be relatively minor and after conversations and research by City staff he had solidified the City’s position, which was explained at the meeting. Mr. Bogorad inquired if any notes were taken at the meeting or a record of the meeting for an administrative appeal to which Mr. Ossont responded that Ms. Borten and Mr. Abrams were taking notes but that those had not been provided to the applicant. He responded again that there was no record other than the fact they were all in attendance at the meeting.

Board Member Trojak asked which documents Mr. Ossont provided to the applicant following the meeting to which he answered it was a site plan amendment to final site plan application as well as a site development checklist. Board Member Knoebel said that the October 18, 2006, letter was not in the record.

Mr. Chen asked if the agency rendering the decision was the City Manager. Mr. Ossont said the City of Gaithersburg has the ability to make zoning decisions as well as empowers the staff to make decisions on certain applications. Mr. Chen asked which code provision authorized the City to make that decision to which Mr. Ossont was not sure of the section in the ordinance. He also answered that he was not sure if the applicant or representatives were informed of the right to take an appeal during the meeting.

Chairperson Kaye swore in witness Stan Abrams, testifying for the City. Mr. Abrams testified that at the October 23rd meeting it was conveyed by himself to Mr. Harris and his clients what was required to reoccupy the building. Upon further questioning, Mr. Abrams explained that he told the applicants it had been determined that they would need a site plan amendment and that the paperwork was provided to them.

Mr. Podolsky directed the Board's attention to Section 24-175 of the Zoning Ordinance where it states the administration and enforcement of this chapter shall be by the city manager or his authorized representative.

Mr. Bogorad asked when Mr. Abrams' service as special counsel was used to which he responded when the City deems it needs advice, drafting, or any other type of representation. He added that he does not have authorization to make decisions rather express what those decisions are to other people. Mr. Podolsky asked Mr. Abrams if at the October 23rd meeting the City's decision was expressed to them clearly to which Mr. Abrams responded that it had.

Chairperson Kaye asked Mr. Abrams which section in the City Code allows final decisions to be made orally. Mr. Abrams said that as City Attorney for 25 years, the general determinations were made by whoever was the director of Planning and Code as the authorized designee of the City Manager. He added that in many cases they were conveyed orally to whoever came in for an application or question.

THE BOARD OF APPEALS TOOK A SHORT RECESS
AT 9:50 P.M. IT RECONVENED AT 9:57 P.M.

Mr. Podolsky entered the October 18, 2006, letter into the record which was recorded as Exhibit Number 29. Mr. Podolsky said that he could not locate anything in the City Code that requires that all decisions be made orally or in writing.

Chairperson Kaye swore in witness Robert Harris, attorney testifying for the petitioner. In questioning from Mr. Bogorad, Mr. Harris said he represented RST Development and handles their development approvals. He stated he was in attendance at the October 23rd meeting which he organized due to confusion with City staff and Mr. Copeland regarding whether the property was non-conforming and why they could not immediately reoccupy the buildings.

Mr. Harris continued that he was not advised prior to the meeting that the purpose of the meeting was for the City to communicate a final decision. He added that in zoning and land use work there frequently are meetings to discuss issues relating to a case. Mr. Harris explained that his intentions

at the meeting were to share why this was a non-conforming use and why his client should be allowed to reoccupy the buildings. He said Mr. Abrams suggested it was a non-conforming use and as such it would require a site plan amendment. Mr. Harris asked Mr. Abrams how it could have been a non-conforming use when the use is multi-family, the use hasn't changed, and the use is permitted in that zone.

Mr. Bogorad asked if anyone on behalf of the City made a statement that the City was adopting that position as their final determination to which Mr. Harris said the words final decision were not used. He added that no one suggested in the meeting that if he was dissatisfied that he should appeal the decision. Mr. Harris said that during the meeting he also inquired if he could meet with the Planning Commission or Mayor and City Council to discuss this as he felt it was a politically-based decision. Mr. Abrams responded that he could not go to the Planning Commission but if he wanted to he could go to the Mayor and Council.

Further, Mr. Harris said the City represented that a minor site plan amendment would be needed and it would be required by November 9, 2006, to get it onto the December 6th Planning Commission agenda. Mr. Harris said that after the meeting, Mr. Ossont provided them with a site plan amendment form but they were not provided with the checklist. Mr. Bogorad asked if after the October 23rd meeting did the City take a position inconsistent with their ability to get a filing on file in a couple of weeks. Mr. Harris responded that the filing requirements grew into essentially a full-blown brand new site plan. The implication was that the City was going to be looking at the buildings themselves and potentially change the buildings. He said that Mr. Abrams had only indicated at the October 23rd meeting that he felt the parking spaces were insufficient making it a non-conforming use and to apply for a parking waiver and site plan amendment.

Mr. Bogorad asked when Mr. Harris received the November 8, 2006, letter to which he said a few days after that date and then after review of the letter, determined it left issues open as what may need to be filed. He advised his clients to protect themselves and note an appeal to the November 8th letter. Mr. Harris said after filing the appeal he received a call from Ms. Seiden who suggested they might not want to file the appeal as it didn't look like a final decision. Mr. Harris requested a letter to that affect to which Ms. Seiden responded at a later time that she would be unable to send that letter.

Mr. Podolsky asked Mr. Harris if at the October 23rd meeting any City staff objected to Mr. Abrams' position to which he said no one from the City said one way or the other. Mr. Harris also answered that he did not ask Mr. Abrams to communicate his or the City's position in writing because he did not think it was a position at all. He said he left that meeting believing he was going to contact the Mayor.

Mr. Podolsky asked if in the City Code it suggests that the Mayor and City Council have the authority to reverse a staff or representatives decision to which Mr. Harris responded that the Mayor and Council have a great deal of control over the people in the City. He said he was informed at the meeting not to contact the Planning Commission so felt his only recourse was the Mayor and Council. He also answered that if a formal decision is made at a meeting that he usually is allowed to be heard and have an opportunity to express his position. Having not been given much of an opportunity to be heard he believed it was simply Mr. Abrams' opinion at the meeting. Mr. Podolsky asked if Mr. Humpton had attended prior meetings during the townhouse discussion to which Mr. Harris said he did not handle those meetings personally but has known Mr. Humpton to

attend meetings on behalf of the City. Mr. Harris responded to additional questions that he did not request a written decision from either Mr. Abrams or Mr. Humpton and then after the November 8th letter decided there was no other relief than to go to the Board of Appeals.

Board Member Knoebel said that Mr. Harris testified that the November 8th letter left some matters unsettled and asked for clarification on those matters. Mr. Harris said that from the letter there was still some uncertainty as to what filing requirements there would be for a site plan amendment. Mr. Harris also answered that they did not file the site plan amendment by November 9th because they did not know what the filing requirements were because they had not been provided with a checklist. Board Member Trojak asked when Mr. Harris received the November 8th letter to which he said it was sometime after the 8th so they filed an appeal then.

Board Member David Friend asked Mr. Harris if he or his clients asked for clarification on whether the decision was the decision of the City to which he said he did not because he had believed it was a decision of the City. Mr. Chen asked if during the October 23rd meeting, anyone identified an ordinance section that requires the filing of a site plan amendment to which Mr. Harris said there was no discussion about that. He said that Mr. Abrams did the communicating but he did not ever state he was speaking as a representative of the City or City Manager.

Chairperson Kaye swore in witness Scott Copeland, principal of RST Development. Mr. Bogorad asked if October 23rd was the first time where reoccupying the apartments was discussed. Mr. Copeland said he had met with Mr. Felton and Mr. Ossont and with his colleague Steve Siegel on September 27, 2006. He said because they never recorded the plat for the 130 townhouses that they felt they could use the existing apartments to which he said Mr. Ossont agreed. Mr. Copeland said they walked out of that meeting thinking they were ready to move forward with the renovation and re-tenanting of the project.

Mr. Bogorad asked if he had an understanding of the purpose of the October 23rd meeting. Mr. Copeland said they were expecting to receive clarification and discussion as to what had to be done to reoccupy the apartments. He said they left that meeting thinking they might need a minor site plan amendment but not that there was a final decision of the City.

In response to a question of Mr. Bogorad, Mr. Copeland said Mr. Felton did not express the manner in which the City would communicate its official position. He continued that on November 3rd he received a phone call from Mr. Felton and Mr. Ossont in which the conversation got heated and Mr. Felton suggested that any further decisions or positions be done in writing. Mr. Copeland noted he took diligent notes during the conversation because of the tone of the conversation and Mr. Bogorad asked that the notes be entered into the record. Mr. Podolsky objected as the testimony was to relate to the October 23rd meeting. Mr. Bogorad argued that they were also discussing what happened on November 8th to which these notes can bear significance. Chairperson Kaye said they can be entered as an exhibit but they might not go into the record. They were identified as Exhibit Number 30.

Mr. Podolsky asked if Mr. Copeland had written a letter dated October 18th to the Mayor expressing concern about the City requiring him to go through the site plan amendment process. Mr. Copeland responded he had because he was not sure why the City took the position that the property was a non-conforming use. Mr. Copeland also responded that he went to the October 23rd

meeting to have a discussion and understanding of the City's position. He said they walked out of the meeting thinking that the City had its position and he had his position.

Responding to Board Member Knoebel, Mr. Copeland said he definitely was not told he had to file a site plan amendment prior to October 23rd but did have a hint of it on October 9th or 10th. He stated it was his position on September 27th that since the plat was never recorded and final plans for the townhouses were not approved by staff, that with relatively modest rehab that he would get the apartments re-rented.

Board Member Friend asked Mr. Copeland what his understanding was of the City's position to which he said he was really disappointed as it was not a discussion at all but just a legal opinion by Mr. Abrams and not the City's position.

In closing, Mr. Podolsky referred to Mr. Copeland's words in that he said at the end of the October 23rd meeting the City had their position and they had theirs. Mr. Podolsky said it was clear that the City had rendered a position and that is not what RST is appealing. He said they were appealing the November 8th letter when they found out they would have to submit paperwork, surveys, and other documentation. Regarding oral decisions, Mr. Podolsky said they cited some cases that make it clear that decisions can be made orally. They also cited cases about what is appealable and what is not. Mr. Podolsky, in summary, said there was an oral decision and it was final and they knew the City's position as the petitioner's entire team was there.

Mr. Bogorad said the Board cannot decide whether or not the October 23rd meeting is a final appealable decision based on whether a letter sent on November 8th says it is a final decision. He said that in the future every time a land owner has a conversation, informal discussion with City staff or counsel, and there is disagreement on an issue, then the owner is basically in the position where they are going to waive their right and appeal.

Board Member Trojak asked Mr. Podolsky if he would call the October 23rd meeting a public meeting. Mr. Podolsky said for the purposes of this case, yes, but not in a sense that it was a public hearing, but in the sense that the parties involved were present.

Motion was made by Board Member Knoebel, seconded by Board Member Rieg, that the Board of Appeals conduct a closed executive session as of 10:50 p.m., January 11, 2007, and the meeting be held pursuant to Section 10-508(a)(7) of the State Government Article of the Annotated Code of Maryland, for the purpose of consultation with legal counsel.

VOTE: 5-0

THE BOARD OF APPEALS TOOK A RECESS AT 10:50 P.M.
TO CONDUCT A CLOSED EXECUTIVE SESSION.
IT RECONVENED AT 11:20 P.M.

Upon reconvening, Chairperson Kaye read the following statement into the record:

A closed executive session was held by the Board of Appeals at 10:50 p.m. in the Gallery of City Hall for the purpose of consulting with legal counsel William Chen. The closed session was held pursuant to Section 10-508(a)(7) of the State Government Article of the Annotated Code of Maryland. No vote was taken during this session. All Board Members were present. Other than receiving the advice of Mr. Chen, no action was taken by the Board in the closed executive session, and it adjourned at 11:20 p.m. The minutes of that closed session are maintained separately under seal.

Motion was made by Board Member Trojak, seconded by Board Member Knoebel, to close the record on A-526.

VOTE: 5-0

Board Member Trojak had significant concerns that for an issue this important, there was no written or documented decision by the City that this was their final rule. He also had concerns that RST Development could have been confused that they were not getting a final rule and the decision until the November 8th letter arrived.

Board Member Rieg agreed with those comments and the fact that the City did not clearly communicate to RST Development that a final decision was being made.

Board Member Knoebel believed that RST had a hint that it was a final decision but Mr. Knoebel was concerned that there is no public record or documented material from the meeting.

Board Member Friend said that from testimony he is concerned about not having some sort of record; documentary, written, or acquitted evidence. In cases where there are action in front of Board of Appeals or Planning Commissions, recorded information about a decision would provide something to review and actually determine what was understood at that meeting.

Chairperson Kaye referenced the Crofton Partners case where it describes what the public record documenting material in connection with a transaction of public business is, and that verbal communication is not listed for what would be considered a public record. He said the difficulty of having oral final decisions is clear from the testimony in this matter because there is no public recording of it to know exactly what was said. He also expressed concern that the aggrieved party needs to know that a decision is final. Regarding the November 8th letter, the only determination mentioned is that the City Attorney's office has determined that RST must obtain approval. Mr. Kaye said attorneys give advice and that he does not think there is authority for the City Attorney to make a determination.

Motion was made by Board Member Knoebel, seconded by Board Member Trojak, to dismiss the appeal of A-526.

Discussion: The Board made it clear that the motion was made to dismiss the Administrative Review for lack of jurisdiction, and not to grant the Motion to Dismiss for late filing for Administrative Review.

VOTE: 5-0

III. ELECTION OF OFFICERS

Motion was made by Board Member Trojak, seconded by Board Member Friend, to elect Harvey Kaye as Chairperson and Richard Knoebel as Vice Chairperson.

VOTE: 5-0

IV. ADJOURNMENT

There being no more business to come before this meeting of the Board of Appeals, the meeting was adjourned at 11:45 p.m.

Respectfully submitted,

Karen J. Jordan